INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statement	3
Argument	4
Conclusion	13
Appendix	15

CITATIONS

Cases:

Adickes v. *S. H. Kress & Co.*, 398 U.S. 144	9
Allen v. *Van Cantfort*, 436 F. 2d 625, certiorari denied, 402 U.S. 1008	8
Barnes v. *United States*, 412 U.S. 837	7
Beasley v. *United States*, 491 F. 2d 687	8
Blumenthal v. *United States*, 332 U.S. 539	5
Bruner v. *United States*, 432 F. 2d 931	8
Costello v. *United States*, 350 U.S. 359	6
Dunn v. *United States*, 284 U.S. 390	7
Hamling v. *United States*, No. 73-507, decided June 24, 1974	7
Herring v. *Estelle*, 491 F. 2d 125	8
Lawn v. *United States*, 355 U.S. 339	9
McQueen v. *Swenson*, 498 F. 2d 207	8
Moore v. *United States*, 432 F. 2d 730	8
Odom v. *United States*, 377 F. 2d 853	9
Opie v. *Meacham*, 419 F. 2d 465, certiorari denied, 399 U.S. 927	9
United States v. *Brickey*, 426 F. 2d 680, certiorari denied, 400 U.S. 828	11

571-478—75——1

Cases—Continued

	Page
United States v. *Calandra*, 414 U.S. 338	6
United States v. *Cioffi*, 487 F. 2d 492, certiorari denied *sub nom. Ciuzio* v. *United States*, 416 U.S. 995, rehearing denied, 417 U.S. 978	13
United States v. *DeCoster*, 487 F. 2d 1197	8, 9
United States v. *Ellenbogen*, 365 F. 2d 982, certiorari denied, 386 U.S. 923	11
United States v. *Grant*, 489 F. 2d 27	9
United States v. *Miramon*, 470 F. 2d 1362, certiorari denied, 411 U.S. 934	8
United States v. *Robinson*, 502 F. 2d 894	8
United States v. *Tourine*, 428 F. 2d 865, certiorari denied, *sub nom. Burtman* v. *United States*, 400 U.S. 1020	12
United States v. *Wisniewski*, 478 F. 2d 274	10
United States v. *Yanishefsky*, 500 F. 2d 1327	8

Statutes:

21 U.S.C. (1964 ed.) 173	3
21 U.S.C. (1964 ed.) 174	3

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-713
ARMANDO ALVAREZ, PETITIONER
v.
UNITED STATES OF AMERICA

NO. 74-5684
JORGE INFIESTA, PETITIONER
v.
UNITED STATES OF AMERICA

NO. 74-5685
DOMINGO DEL CRISTO, PETITIONER
v.
UNITED STATES OF AMERICA

NO. 74-5736
CHARLES BUSIGO-CIFRE, PETITIONER
v.
UNITED STATES OF AMERICA

NO. 74-5804
CIRO RODRIGUEZ CALANA, PETITIONER
v.
UNITED STATES OF AMERICA

NO. 74-5827
CIRILO FIGUEROA, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 506 F.2d 455.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 1974. The petition in No. 74–713 was timely filed on December 7, 1974, and the petitions in Nos. 74–5684 and 74–5685 were timely filed on December 9. Mr. Justice Marshall extended the time for filing in No. 74–5804 to January 7, 1975, and the petition was timely filed on January 3, 1975. The petitions in Nos. 74–5736 and 74–5827 were filed on December 19, 1974, and January 9, 1975, respectively, no extension of time having been granted; they are thus out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supports the court's conclusion that there was a single conspiracy.

2. Whether the evidence was sufficient to support the conspiracy convictions of petitioners Del Cristo and Alvarez.

3. Whether the acquittal of petitioner Cifre on the substantive count precludes his conviction on the conspiracy count.

4. Whether petitioners Infiesta and Calana were denied the effective assistance of counsel.

5. Whether the government improperly used a chart in presenting its case to the jury.

6. Whether the trial court improperly marshaled the evidence for the jury.

7. Whether the prosecution of petitioner Figueroa was the result of impermissible prosecutorial selectivity.

8. Whether petitioner Figueroa's conviction is precluded by a previous conviction for dealing in heroin.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners Alvarez, Infiesta, Calana, Del Cristo and Figueroa were convicted of substantive and conspiracy counts involving trafficking in heroin, in violation of 21 U.S.C. (1964 ed.) 173 and 174. Petitioner Cifre, although acquitted on the substantive count, was convicted on the conspiracy count. Petitioners received the following sentences: Alvarez, Figueroa, and Infiesta, concurrent terms of eight years' imprisonment; Calana, concurrent terms of six years' imprisonment; Del Cristo, concurrent terms of ten years' imprisonment; Cifre, ten years' imprisonment.

Briefly summarized, the evidence adduced at trial revealed a complex chain-type conspiracy that purchased heroin in large quantities, diluted and transported it, and resold it for eventual street sale. In early 1970, Raul Ortega-Alvarez[1] possessed some 55 kilos of heroin, which had been imported from South America (T. 687–699, 736–749). The heroin was stored at the home of petitioner Calana, who received $1,000 per kilo. There it was cut and mixed for delivery in large quantities to the next level of dealers (T. 107,

[1] Ortega-Alvarez also was convicted but is not a petitioner here.

113–117, 823–826, 832–836). On at least one occasion the heroin was prepared for delivery at petitioner Infiesta's home, in his presence and with his help (T. 149–150, 868).

Co-conspirators Miguel Rodriguez and Romero Gonzalez[2] generally handled the day-to-day transactions for Ortega. The sales were made on credit, with the intermediate "retailer" making payments after he had disposed of some of the heroin. In this manner, petitioners Infiesta (T. 869, 871–872), Figueroa (T. 214–225), Cifre (T. 158–161, 884–891), Del Cristo (T. 225–229, 891–898), and Alvarez (T. 231–234, 899–904, 909–922) took possession of and subsequently paid for large quantities of heroin. Each was implicated in at least two transactions, involving from one to six and one-half kilos.

With the exception noted at page 9, *infra*, the court of appeals considered and rejected the arguments made here.

ARGUMENT

1. Petitioners Alvarez, Del Cristo, and Figueroa contend that the evidence showed that they were involved in multiple conspiracies rather than the single conspiracy with which they were charged and for which they were convicted. The thrust of their argument is that the evidence established a separate conspiracy for each transaction. This claim was

[2] Rodriguez and Gonzalez pleaded guilty and were sentenced to terms of ten and six years' imprisonment, respectively.

answered in the opinion of the court below, on which we rely (506 F. 2d at 457):

> * * * [w]hen large quantities of heroin are being distributed, each major buyer must be presumed to know that he is part of a wide-ranging venture, the success of which depends on the performances of others whose identities he may not even know. *United States* v. *Mallah*, 503 F. 2d 971, 983–4 (2d Cir. 1974); *United States* v. *Arroyo*, 494 F. 2d 1316, 1319 (2d Cir. 1974), petition for cert. filed, 43 U.S.L.W. 3005 (April 22, 1974) (No. 1574); *United States* v. *Bynum*, 485 F. 2d 490, 495–496 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903, 94 S. Ct. 2598, 41 L. Ed. 2d 209 (1974). The jury in this case had sufficient evidence to find that there was a single conspiracy, even though several of the members participated directly in relatively few of the transactions involved.

See also *Blumenthal* v. *United States*, 332 U.S. 539, 556–559.

2. a. Petitioner Del Cristo argues that the evidence was insufficient to support his conviction. He contends that non-hearsay evidence linking him to the conspiracy was lacking and that the government did not prove he had possessed heroin. These claims are not supported by the record.

Rodriguez testified that he had discussed with Del Cristo the possibility of a purchase of heroin and that he had so informed Ortega-Alvarez (T. 224–226). Subsequently, Del Cristo made a payment to Rodriguez at a bar (T. 225–227). Similarly, Gonzalez testified that he and Del Cristo agreed to the purchase of heroin on credit and that Del Cristo had difficulty in

making payments on that purchase (T. 891–896). This is sufficient non-hearsay evidence to link Del Cristo to the conspiracy, and to allow hearsay declarations to be used against him.

The fact that Gonzales and Rodriguez disagreed on whether Rodriguez had delivered heroin to Del Cristo is not fatal to the government's case. The jury could, of course, have found Gonzales to be the more credible of the two and accepted his version of events. Moreover, even had the jury believed Rodriguez, it still could have convicted Del Cristo because both witnesses agreed that Del Cristo was negotiating for the purchase of a substantial quantity of heroin and that he subsequently began making payments to Rodriguez. From this the jury could properly have inferred that another of the conspirators (perhaps Ortega-Alvarez) had delivered the heroin that Del Cristo had agreed to purchase and for which he began making payments.[3]

b. Alvarez contends that he could not properly have been convicted on the substantive count because of discrepancies between the testimony of Gonzales and Rodriguez. Although, as Alvarez points out, the witnesses' recollection differed as to the exact quantity,

[3] Del Cristo also challenges the indictment on the ground that the evidence presented to the grand jury was insufficient to allow it to indict him. However, in *Costello* v. *United States*, 350 U.S. 359, 363, this Court stated: "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." Accord, *United States* v. *Calandra*, 414 U.S. 338, 345.

price, and delivery arrangements, both agreed that Alvarez purchased approximately 6 kilograms of heroin in four separate purchases (T. 231–234, 237–238, 899–904, 909–922, 948–949). In such a situation there exists sufficient evidence to allow the case to go to the jury; absolute consistency among witnesses is not required.[4]

3. Petitioner Cifre contends that his conviction on the conspiracy count cannot stand because he was acquitted on the substantive count. But it is well settled that inconsistent verdicts are within the prerogative of a jury and do not mandate reversal. *Hamling* v. *United States*, No. 73–507, decided June 24, 1974, slip op. 10–11; *Dunn* v. *United States*, 284 U.S. 390. Nor was the acquittal on the substantive count necessarily inconsistent with conviction on the conspiracy charge. The jury could have found persuasive the testimony that petitioner and Gonzales discussed a purchase of a large quantity of heroin (T. 884–886). This meeting would support the conspiracy conviction while permitting the jury to entertain a reasonable doubt as to petitioner's role in the two purchases, which were carried out through intermediaries (T. 886–887).

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[4] The conclusion of the court of appeals that "when large quantities of heroin are being distributed, each major buyer must be presumed to know that he is part of a wide-ranging venture" also answers Alvarez's claim that the evidence was insufficient to demonstrate his participation in the conspiracy. In any event, Alvarez received concurrent sentences on the conspiracy and substantive counts, and the Court need not consider this claim, which is addressed only to the conspiracy count. *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16.

571-478 75 2

4. a. Petitioner Infiesta contends that he was inadequately represented by counsel at trial because his attorney did not sufficiently develop discrepancies between the testimony of Gonzales and that of Rodriguez. He also urges this Court to reconcile the conflict between those courts that hew to the "farce and mockery of justice" standard (as does the court below) and those courts that have adopted the more lenient "whether the defendant received reasonably competent representation" standard (Infiesta Pet. 15). We submit that since Infiesta's claim must fall under any standard, there is no occasion to review this issue in his case.[5]

The discrepancies to which Infiesta refers—including the identities of the parties who were present at

[5] As petitioner notes, the various circuits use different phrases to describe the standard to be used in evaluating the adequacy of counsel. The First, Second, Seventh, Eighth, Ninth, and Tenth Circuits subscribe to the view that representation is inadequate only if the trial was reduced to a "farce or a mockery of justice" or if the court's conscience is shocked. *Allen* v. *Van Cantfort*, 436 F. 2d 625, 630 (C.A. 1), certiorari denied, 402 U.S. 1008; *United States* v. *Yanishefsky*, 500 F. 2d 1327, 1333 (C.A. 2); *United States* v. *Robinson*, 502 F. 2d 894, 896 (C.A. 7); *McQueen* v. *Swenson*, 498 F. 2d 207 (C.A. 8); *United States* v. *Miranda*, 470 F. 2d 1362 (C.A. 9), certiorari denied, 411 U.S. 934; *Brazer* v. *United States*, 432 F. 2d 931 (C.A. 10). On the other hand the District of Columbia Circuit uses the standard "reasonably competent assistance." *United States* v. *DeCoster*, 487 F. 2d 1197, 1202 (C.A.D.C.); the Third Circuit requires the "customary skill and knowledge which normally prevails at the time and place," *Moore* v. *United States*, 432 F. 2d 730, 736 (C.A. 3 *en banc*); and the Fifth and Sixth Circuits hold that counsel must be "reasonably likely to render effective assistance." *Herring* v. *Estelle*, 491 F. 2d 125, 127-128 (C.A. 5); *Beasley* v. *United States*, 491 F. 2d 687, 696 (C.A. 6).

a conspiratorial meeting and whether petitioner left that meeting with one or with one and one-half kilos of heroin—were not crucial to the government's case. Both witnesses agreed that petitioner was present and had left with a large quantity of heroin. In such a situation, the strategy Infiesta's trial counsel pursued—an attempt to persuade the jury that the two witnesses had invented and then conformed their stories in order to gain their freedom—was a reasonable one, securing to Infiesta both the chance of success that tactic could produce and the benefit of any successful impeachment by the other attorneys, some of whom were emphasizing discrepancies in the testimony of the government witnesses.

Even assuming that this tactic was unwise, however, Infiesta is entitled to no relief. Errors of judgment or tactical decisions that may appear deficient in retrospect do not establish a denial of effective assistance of counsel under any standard. See, *e.g.*, *United States* v. *DeCoster*, 487 F. 2d 1197 (C.A.D.C.); *Odom* v. *United States*, 377 F. 2d 853 (C.A. 5); *United States* v. *Grant*, 489 F. 2d 27 (C.A. 8); *Opie* v. *Meacham*, 419 F. 2d 465 (C.A. 10), certiorari denied, 399 U.S. 927.

b. Petitioner Calana also urges that he was denied the assistance of counsel because he and his wife, although represented by the same counsel, had antagonistic defenses. This claim was not raised in the court of appeals.[6]

[6] This claim is not of such exceptional importance that it should be considered despite the failure to present it to the court of appeals. *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16; *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2.

Before an appellate court will hold that an accused has been denied the adequate assistance of counsel because of joint representation at trial, he must demonstrate the existence of a real conflict of interest or some specific instance of prejudice resulting from that joint representation. See, *e.g.*, *United States* v. *Wisniewski*, 478 F. 2d 274 (C.A. 2). Here, petitioner makes no showing that any conflict existed between his wife's position and his. Rather, he simply points to three facets of his defense, and urges that counsel should have represented him as adequately as counsel represented his wife, who was acquitted. He alleges that because his wife testified while he did not, because she did not exculpate him, and because counsel devoted more time to the summation of her case than to his, an antagonistic position is demonstrated. This is inaccurate, and there is no reason why these actions would have been affected by the joint representation. There was in fact no conflict in the defenses. Both Calana and his wife denied participation in the conspiracy. The latter's defense was more developed because she was able to testify that she had been at work during the times alleged in the indictment and therefore knew nothing about any drug sales.

The trial court was aware that joint representation may lead to problems of conflict of interest in a complex conspiracy trial. The court explicitly inquired of defense counsel whether he "could represent both" petitioner and his wife; counsel responded that "there doesn't seem to be a problem."[7] Counsel went on to

[7] This exchange took place at a pretrial hearing on November 5, 1973. A transcript of that hearing is reproduced as an appendix to this brief.

explain that following discovery he "would be in a better position to determine" whether a conflict would arise and would alert the court if it did. In this situation, where the court made inquiry and was informed that there did not appear to be a problem, it would require a showing more substantial than that made here by petitioner to demonstrate that such a conflict later arose and might have affected counsel's litigation strategy.

5. Petitioner Alvarez contends that the government's use of a chart in its opening statement constituted reversible error. The chart consisted of 3 columns: in the first were listed the alleged suppliers, in the second the alleged distributors, and in the third the alleged customers. The names of the defendants who were actually on trial were in red, and all others were blue. The court did not abuse its discretion in allowing the government to use this chart in order to produce clarity as it attempted to outline for the jury its case against the defendants; defendants have no right to a confused jury. See, *e.g., United States* v. *Ellenbogen,* 365 F. 2d 982, 988 (C.A. 2), certiorari denied, 386 U.S. 923; *United States* v. *Brickey,* 426 F. 2d 680, 686–687 (C.A. 8), certiorari denied, 400 U.S. 828. The situation might be different if the chart contained inadmissible and prejudicial information, or if it made material claims never substantiated by evidence, but that was not the case here.

6. Alvarez also contends that reversible error was committed in the trial court's marshaling of the evidence because, although the court summarized the testimony of Gonzales and Rodriguez, it "totally

ignored the serious contradiction in this testimony" (Pet. 24). This claim is not borne out by the record. The court's summary dealt with the defense case and explicitly set forth seven instances of alleged inconsistencies and contradictions in the witnesses' testimony (T. 2377–2381). See *United States* v. *Tourine*, 428 F. 2d 865, 869 (C.A. 2), certiorari denied *sub nom. Burtman* v. *United States*, 400 U.S. 1020.

7. Petitioner Figueroa contends "that he was singled out for prosecution while other important figures in the conspiracy were not indicted or prosecuted" (Pet. Point I). As the court below stated (506 F. 2d at 458):

> * * * [A] defendant claiming a discriminatory prosecution must show not only that others similarly situated were not prosecuted but also that the decision to prosecute him was based on impermissible considerations such as race or religion. See *United States* v. *Bland*, 153 U.S. App. D.C. 254, 472 F. 2d 1329, 1336 (1972), cert. denied, 412 U.S. 909, 93 S. Ct. 2294, 36 L. Ed. 2d 975 (1973); cf. *Oyler* v. *Boles*, 308 U.S. 448, 456, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962). Figueroa has failed even to allege such invidious discrimination in this case.

8. Finally, petitioner Figueroa contends that his prosecution is barred by the Double Jeopardy Clause because he was convicted in 1972 of selling heroin on February 19 and March 25, 1970.[5] But these two sales of heroin do not involve the same transactions for which Figueroa was convicted in the instant case.

[5] This amplification of Figueroa's claim is derived from his court of appeals brief.

The conspiracy count on which Figueroa now stands convicted is maintainable even if the sales involved in the 1972 conviction took place as part of this conspiracy; a conviction for an overt act of the conspiracy does not bar later conviction for the conspiracy itself. *United States* v. *Cioffi*, 487 F. 2d 492, 497 (C.A. 2), certiorari denied *sub nom. Cinzio* v. *United States*, 416 U.S. 995, rehearing denied, 417 U.S. 978. Count Eleven, the substantive count on which Figueroa was convicted in the instant case, charged (and the evidence showed) that Figueroa purchased heroin on six separate occasions during March and April, 1970, from Rodriguez and Gonzalez. Because Figueroa's 1972 conviction involved a sale (rather than a purchase) of heroin, the substantive offense of which he was convicted here involves a criminal transaction distinct from that supporting the previous conviction, and Figueroa was not placed in a second jeopardy for the same events.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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MARCH 1975.

APPENDIX

UNITED STATES OF AMERICA

v.

DOMINGO DEL CRISTO, ET AL.

73 Cr. 950

New York, November 5, 1973

Room 705

Before: Hon. CHARLES M. METZNER, D.J.

For the Government: *Shirah Neiman, Esq.*

For Defendants Ciro Calana and Francisca Calana: *Hudson Reid, Esq.*

The COURT. Who else do we have?

Ms. NEIMAN. Mr. Calana, your Honor, who has not yet been brought over from West Street.

Mr. REID. I waive Mr. Calana's appearance, your Honor, for the purposes of a bail application.

The COURT. We have two problems here, the bail application——

Mr. REID. And also to exonerate the bail on Mrs. Calana and put her on parole.

The COURT. I see.

Mr. REID. Could we take Mrs. Calana first?

The COURT. I asked you to determine whether you could represent both of them.

Mr. REID. Your Honor, I tried to make a determination based on the interview with her Friday and today and there doesn't seem to be a problem. Yet once again the Court is well aware of the fact that it may arise. It depends on the evidence that the U.S. At-

torney presents at trial. I don't envisage a problem at this time.

The COURT. I don't want to appoint an attorney in the middle of a six-week trial, find out that there is a conflict.

Ms. NEIMAN. I don't think there is one, your Honor, especially in view of the fact that neither one can testify against the other.

Mr. REID. Not only that. After the motions are filed I do believe that any discovery items given by the U.S. Attorney's office, I would then be in a better position to determine, until the motions are filed, because it does allege a conspiracy.

The COURT. That's fair enough. You will continue as representing both of them, but you have to let me know promptly after you receive the information, because I don't want too much time to drag before we have to find another attorney.

Mr. REID. I expect to have my motions filed by December 1st and the return date is the 15th.

Any answering affidavits the Assistant U.S. Attorney gives me, in that time period I would be able to ascertain whether there would be a conflict, by the 15th of December.

The COURT. All right.

Mr. REID. Your Honor, once again I have had an interview with Mrs. Calana.

The COURT. Do you know her real name or correct name? We had a great deal of difficulty on Friday ascertaining it.

The INTERPRETER. Francisco Calana.

The COURT. What was her maiden name?

The INTERPRETER. Ortega.

The COURT. Is it the usual practice to have her called Francisca Calana Ortega?

The INTERPRETER. No. Only Calana.

The COURT. You will have to amend your indictment somehow, Miss Neiman, to correct this. Francisca Calana doesn't seem close to Ortega Rodriguez.

Ms. NEIMAN. Rodriguez is her husband's mother's name and the information I got was that this was the way she was known and that is the way my witnesses refer to her. We could probably amend the indictment so that the first name reflects what she calls herself.

U.S. GOVERNMENT PRINTING OFFICE: 1978